90-141

No. 89-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

BOBBY H. HARDEN - - - - Petitioner

versus

BERIL HOOSIER - - - - - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is the "advice of counsel" claim of qualified immunity an important question of federal law which has not been, but should be, settled by the United States Supreme Court?

2. Was it "objectively reasonable" as a matter of law under *Harlow* v. *Fitzgerald*, 457 U.S. 800, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982) for a police officer to provide to the County Attorney all of the information in the officer's possession connecting an individual to a crime, to rely in good faith on the County Attorney's legal advice regarding the sufficiency of probable cause, and to follow the County Attorney's instructions to submit a proposed arrest warrant to a state judge for consideration?

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No. 89-_____

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BOBBY H. HARDEN - - - - - - *Petitioner*

v.

BERIL HOOSIER - - - - - - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The Memorandum Opinion of the United States District Court for the Western District of Kentucky, Bowling Green Division, was rendered May 23, 1989, and it is unpublished. It is set out in the Appendix hereto.

The opinion of the United States Court of Appeals for the Sixth Circuit was rendered March 13, 1990, and it is unpublished. It is set out in the Appendix hereto.

The Order of the United States Court of Appeals for the Sixth Circuit overruling a petition for rehearing was rendered April 18, 1990, and it is unpublished. It is set out in the Appendix hereto.

CONSTITUTIONAL CLAUSES AND STATUTE INVOLVED

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV. Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Section 1983
Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

JURISDICTION

The Order of the United States Court of Appeals for the Sixth Circuit denying Petitioner's petition for rehearing was entered April 18, 1990; and upon such denial the Opinion of that Court rendered March 13, 1990, became final.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

During the summer and fall of 1985, Respondent, Beril Hoosier, and Dennis Campbell II (related to Mr. Hoosier by marriage) worked together to grow corn on government land in southern Taylor County, Kentucky. (Deposition [hereinafter "Depo."] of Hoosier, pp. 17-32). Mr. Campbell leased the land from the United States Army Corps of Engineers, and Mr. Hoosier supplied the seed, fertilizer, pesticides, and herbicides. (Depo. of Hoosier, pp. 17, 29-30). Both men worked the fields together, planting, cultivating, and harvesting. (Depo. of Hoosier, pp. 21-22). Both men also joined in applying for federal crop insurance for the corn grown on the government land. (Depo. of Hoosier, Exhibit [hereinafter "Ex."] 1). The profits from the joint venture were divided by allocating the corn from designated fields to each man. (Depo. of Hoosier, pp. 20, 31).

On September 9, 1985, a joint aerial search for drugs was conducted by the Taylor County Kentucky Metro Police and the Taylor County Sheriff's Department with the help of the Jefferson County Kentucky Police. (Depo. of Harden, pp. 16-17). During the search, two officers in a helicopter spotted a patch of marijuana in one of the fields

being farmed by Messrs. Hoosier and Campbell. (Depo. of Harden, pp. 16-18, 81-83, 97, and Ex. 4; Depo. of Hoosier, pp. 29-31 and Ex. 1).

A team of officers from the Metro Police and the Sheriff's Department were sent into the field on foot. (Depo. of Harden, pp. 19-20). They found twenty-seven mature marijuana plants in one patch hidden within the corn. (*Id.*).

The evidence indicated that whoever had planted and cultivated the corn had also planted the marijuana. (Depo. of Harden, pp. 20-22). The marijuana patch had not been plowed along with the rest of the field; the old cornstalks from the previous year were still there. (Depo. of Harden, pp. 20, 66). No new corn had been planted in the marijuana patch. (*Id.*). The rest of the corn field was clean and appeared to have been sprayed with herbicide (which kills broadleaf plants such as marijuana), while the marijuana patch was grown up with weeds. (Depo. of Harden, pp. 20-21, 66-67). Also, the marijuana plants were six to seven feet tall, confirming that they were planted or transplanted at about the same time the corn was planted. (Depo. of Harden, pp. 21-22, 65).

After the raid on the marijuana patch on September 12, Petitioner, Bobby H. Harden, Chief of the Taylor County Kentucky Metro Police, was told that Beril Hoosier grew the corn where the marijuana was grown. (Depo. of Harden, p. 68). Chief Harden was certain that he was told but uncertain as to who had told him. (*Id.*). At his deposition, over a year and half after the incident, Chief Harden remembered the person as Deputy Sheriff James Cochran but was uncomfortable swearing to his being the correct person. (*Id.*). Chief Harden pointed out that Deputy Cochran lived in the vicinity of the land in question, trav-

cled the road next to the field everyday, and had been the one to discover the marijuana (and also was the officer who broke his leg jumping from the helicopter). (Depo. of Harden, p. 39). Chief Harden also remembered talking to Deputy Cochran in the hospital. (Depo. of Harden, p. 40).

On September 16, 1985, while the crime was still under investigation, Chief Harden was approached on the street outside of the Taylor County Courthouse by Mr. Hoosier. (Depo. of Harden, p. 22; Depo. of Hoosier, pp. 11-12). According to Chief Harden, Mr. Hoosier confirmed that Mr. Hoosier had grown the corn in question. (Depo. of Harden, pp. 22-23). Later, Mr. Hoosier agreed that he had had the conversation with Chief Harden, and admitted that he had told Chief Harden that he had corn in the vicinity, but he denied that he had revealed to Chief Harden that he and Dennis Campbell were jointly growing corn where the marijuana was found. (Depo. of Hoosier, p. 13).

Chief Harden was aware of prior cases in Taylor County when ownership of a farm where marijuana had been found was sufficient to support charges of growing the marijuana. (Depo. of Harden, p. 70). He could recall one case in particular when the jury convicted a Robert Mathison under similar circumstances. (*Id.*).

Chief Harden was also aware that Mr. Hoosier had been farming with his neighbor, Jerry Cox, in Taylor County and that Mr. Cox had been indicted in January of 1985 for selling marijuana. (Depo. of Hoosier, pp. 87-88). Chief Harden knew that Mr. Hoosier had been farming with another neighbor, Lester Harren, who was also arrested on a marijuana charge in October of 1984. (Depo. of Hoosier, p. 86). And finally, Chief Harden's Department

had found 1,500 marijuana plants on land owned by Mr. Hoosier's brother-in-law. (Depo. of Harden, p. 76).

Chief Harden then approached Taylor County Attorney, Larry Noe, and shared *all* of the information Chief Harden had gathered. (Depo. of Harden, p. 71). The County Attorney was presented with the evidence that supported the contention that whoever grew the corn also grew the marijuana. (Depo. of Harden, pp. 26 and 71). The County Attorney was apprised that Chief Harden had been told that the corn had been grown by Mr. Hoosier. (*Id.*). The County Attorney was also told of the conversation between Chief Harden and Mr. Hoosier and Chief Harden's understanding that Mr. Hoosier had confirmed that Mr. Hoosier had grown the corn. (*Id.*). The County Attorney was asked specifically about the probable cause to issue an arrest warrant. (*Id.*). Not only did Mr. Noe conclude that there was probable cause, he typed up the warrant himself. (Depo. of Harden, pp. 26, 71-72).

Chief Harden then took the warrant to Taylor District Court Judge Douglas M. George. (*Id.*). Judge George reviewed the warrant and then signed it. (Depo. of Harden, pp. 26, 72).

Chief Harden and Officer Don Parker served the warrant on Mr. Hoosier. (Depo. of Harden, p. 28; Depo. of Hoosier, pp. 64-65). The charge was read to Mr. Hoosier and he was apprised of his civil rights. (Depo. of Harden, pp. 28, 74; Depo. of Hoosier, pp. 64-65). Mr. Hoosier was then allowed to drive himself down to the Courthouse where he was fingerprinted and allowed to make a bond of $304. (Depo. of Harden, pp. 74-75; Depo. of Hoosier, pp. 65-67). He then simply returned home. (*Id.*).

Mr. Hoosier could have challenged the probable cause to charge him with the offense at a preliminary hearing before the State Judge. (Kentucky Rules of Criminal Procedure 3.07, 3.10, 3.14). Instead Mr. Hoosier waived his preliminary hearing. (Depo. of Harden, p. 103; Depo. of Hoosier, p. 67).

Commonwealth's Attorney Barry Bertram presented the case to the Taylor County Grand Jury. (Depo. of Harden, pp. 42, 45; Depo. of Hoosier, p. 69). Both Chief Harden *and* Mr. Hoosier were called to testify. (Depo. of Harden, pp. 41, 43-44; Depo. of Hoosier, pp. 68-69). On two occasions the Grand Jury did not indict or issue a no-true bill, but simply asked for more information. (Depo. of Harden, pp. 44-45). The case is still pending. (Depo. of Harden, pp. 45-46).

On November 1, 1985, Mr. Hoosier, filed a complaint with the United States District Court for the Western District of Kentucky, Bowling Green Division. The District Court's jurisdiction was involved pursuant to 28 U.S.C. Section 1343. (Complaint, p. 2). Mr. Hoosier asserted that his rights had been violated contrary to the Fourth, Sixth, and Fourteenth Amendments to the United States Constitution and the Civil Rights Act [42 U.S.C. Section 1983]. (*Id.*). Specifically, Mr. Hoosier alleged that Chief Harden had arrested Mr. Hoosier without probable cause, intentionally, maliciously, and with reckless disregard for the rights of Mr. Hoosier. (Complaint, p. 3). Mr. Hoosier sought money damages of $1,503,500.00. (Complaint, pp. 5-6).

On October 12, 1988, after the parties had completed their discovery, Chief Harden moved the District Court to

grant him summary judgment. After a hearing, the District Court issued an Order granting the motion on April 19, 1989. On May 17, 1989, the District Court issued a Judgement and Memorandum Opinion confirming the earlier Order which granted the summary judgment. (Appendix 9a).

On May 31, 1989, Mr. Hoosier appealed the District Court's decision to the United States Court of Appeals for the Sixth Circuit. The Court of Appeals reversed and remanded the case. (Appendix 1a). A petition for rehearing by Chief Harden was denied by the Court of Appeals on April 18, 1990. (Appendix 15a).

ARGUMENT

A. The "Advice of Counsel" Claim of Qualified Immunity Is An Important Question of Federal Law Which Should Be Settled by the United States Supreme Court.

The Court has recognized the dangers of frivolous law suits against public officials. (*Scheuer* v. *Rhodes*, 416 U.S. 232, 40 L. Ed. 2d 90, 94 S. Ct. 1683, 71 Ohio Ops. 2d 474 [1974]; *Butz* v. *Economou*, 438 U.S. 478, 57 L. Ed. 2d 895, 98 S. Ct. 2894 [1978]; *Harlow* v. *Fitzgerald*, 457 U.S. 800, 73 L. Ed. 2d 396, 102 S. Ct. 2727 [1982]). In addition to the monetary costs to defend such suits, they distract public officials from their duties and inhibit appropriate discretionary action. (*Harlow*, 457 U.S. at 816). They, ". . . dampen the ardor of all but the most resolute or the most irresponsible [public officials], in the unflinching discharge of their duties." (*Harlow*, 457 U.S. at 814, quoting *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 [2d Cir. 1949], cert. denied, 339 U.S. 949, 94 L. Ed. 1363, 70 S. Ct. 803

[1950]). Perhaps even more threatening to good government, such unfounded personal attacks discourage qualified people from serving the public. And, not to be overlooked, such suits unnecessarily add to the burden of the judiciary.

In response to the dangers of frivolous law suits against public officials, the Court developed the principle of qualified immunity. (See, *Pierson* v. *Ray*, 386 U.S. 547, 18 L. Ed. 2d 288, 87 S. Ct. 1213 [1967]; *Scheuer* v. *Rhodes, supra; Butz* v. *Economou, supra*). But in *Harlow* the Court realized that the goal of avoiding excessive disruption of officials by permitting the resolution of many insubstantial claims on summary judgment was not being met because the standard set by the Court regarding subjective intent was difficult if not impossible to resolve through a motion for summary judgment. (*Harlow*, 457 U.S. at 816-18). To try to solve this problem of practical application and take a major step toward achieving the goal of reducing inappropriate attacks on government officials, the Court adopted a test that focused on the objective reasonableness of the official's acts. (*Harlow*, 457 U.S. at 819).

Unfortunately, *Harlow* and its progeny have not entirely solved the problem for a particular group of public officials, police officers submitting affidavits in support of arrest warants, who are being subjected to retaliatory civil rights suits by criminal defendants in a transparent attempt to chill enforcement of the law. The Court in *Malley* v. *Briggs*, 475 U.S. 335, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986), emphasized that if officers of reasonable competence could disagree as to whether there is probable cause to issue the warrant, immunity should be recognized. (475 U.S. at 341). But *Malley* also eliminated any protection the police officer might have expected from the intervening

decision of the magistrate who issued the warrant. (475 U.S. at 345-46). This state of the law has unintentionally invited after-the-fact reassessments of probable cause any time a grand jury fails to indict. As a prime example, in the case at bar, the Court of Appeals expressly gave great weight to the fact that the grand jury failed to indict.

It is now important for the Court to take the next step in the search for the correct balance between the public need for functional police and individuals' rights to pursue personal actions against the officers. The number of officers and criminal defendants, alone, creates its own imperative for the utmost clarity. With thousands of arrest warrants being issued every day, any confusion in the standard of responsibility invites an epidemic of unnecessary civil rights actions.

In *Malley* the Court encouraged police officers to "reflect" on whether they have a reasonable basis for believing that an affidavit establishes probable cause. (475 U.S. at 343). In *Anderson* v. *Creighton*, 483 U.S. 635, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987), the Court wrote,

> The general rule of qualified immunity is intended to provide government officials with the ability 'reasonably [to] anticipate when their conduct may give rise to liability for damages.' Davis, 468 U.S., at 195, 82 L. Ed. 2d 139, 104 S. Ct., at 3012. Where that rule is applicable, officials can know that they will not be held personally liable as long as their actions are reasonable in light of current American law. (483 U.S. at 646).

But, in the very next sentence of *Anderson*, the Court identified a major practical problem that police officers face

when they try to actually function within the theory. The Court wrote, "That security would be utterly defeated if officials were unable to determine whether they were protected by the rule without entangling themselves in the vagaries of the English and American common law." (483 U.S. at 646). In other words, an officer can reflect on the legal sufficiency of his/her affidavit and enjoy the comfort of reasonably anticipating whether or not he/she will be subjected to personal liability *so long as he/she is well trained in the law and current in his/her knowledge.*

Since it is not practical for all or even many police officers to be attorneys, if the Court wants qualified immunity to be meaningful in this context it is important for the Court to encourage officers to seek competent legal advice regarding probable cause and to comply with the advice they receive. The way to take that needed step toward greater clarity is for the Court to adopt a balanced "advice of counsel" claim of qualified immunity.

B. The Court Should Establish That It Is "Objectively Reasonable" as a Matter of Law for a Police Officer to Provide to a County Attorney All of the Information in the Officer's Possession Connecting an Individual to a Crime, to Rely in Good Faith on the County Attorney's Legal Advice Regarding the Sufficiency of Probable Cause, and to Follow the County Attorney's Instructions to Submit a Proposed Arrest Warrant to a State Judge for Consideration.

In *Malley* v. *Briggs, supra*, the Court was "guided in interpreting Congress' intent" in enacting 42 U.S.C. Sec. 1983 by the common-law tradition regarding immunity. (475 U.S. at 342). Specifically, the Court looked at the rules regarding immunity from a suit for malicious prose-

cution. (*Id.*). Comparison of the defenses to the common-law action for malicious prosecution and the statutory action for the deprivation of civil rights regarding criminal proceedings was, of course, quite appropriate due to the similarity of the actions. It is equally appropriate to look to the law of malicious prosecution when the Court is considering an "advice of counsel" claim of qualified immunity.

In Kentucky, the jurisdiction in which the case at bar arose, "The advice of the attorneys, based on a full and fair disclosure of all material facts, is a complete defense to an action for malicious prosecution." (*Hale* v. *Baker*, 483 S.W. 2d 133, 134 [Ky. 1972]). This "advice of counsel" defense appears to be universally accepted in other states and jurisdictions as well. (See e.g., *Devine* v. *Patterson*, 242 F. 2d 828 [6th Cir., 1957]). The Restatement of Torts 2d, Sec. 666 takes a similar view as long as the advice is sought in good faith and after a full disclosure of the facts within the accuser's knowledge and information.

Every individual in our criminal justice system has his or her distinct role to play. All the authority to investigate facts, weigh those facts against a legal standard, obtain an indictment, prosecute or defend, judge, and convict or exonerate are not lodged in a single person. By the same token, all of the responsibility for the system does not rest on the shoulder of a single individual.

Chief Harden's authority and responsibility were to gather facts about an alleged crime and present those facts to the next person in the chain of authority. That next person was not the State Judge, it was the County Attorney.

As with most law enforcement officers, Chief Harden is not a lawyer. He is not equipped to decide whether a

set of facts does or does not constitute probable cause. As counsel for Respondent pointed out when objecting to a question posed to Mr. Hoosier during his deposition: "He's not trained as a lawyer. He doesn't know what the legal definition of probable cause is. . . ." (Depo. of Hoosier, p. 78). In fact, the issue of probable cause is difficult enough for attorneys and judges with years of experience and training.

If Chief Harden had gone directly to the State Judge and sought a warrant, his pretentiousness very well may have earned him the personal damages sought by Respondent for any mistake in actual probable cause. Instead, Chief Harden did what any reasonably competent officer would have done. He took *all* of the information he had to the next person in the chain of authority, the Taylor County Attorney, Larry Noe. By law, the County Attorney is the chief legal officer in the County. He is prepared by education and experience to make the difficult evaluation of facts against legal standards of probable cause.

There is no dispute that Chief Harden shared all of his information about the crime and Beril Hoosier with the County Attorney. (Depo. of Harden, p. 71). There is no evidence at all that Chief Harden misstated the facts or misled the County Attorney. There is no question that Chief Harden asked the County Attorney specifically: "Do you think we've got enough for a warrant or to go to the Grand Jury?" (Depo. of Harden, p. 26). As was his normal procedure, Chief Harden sought the advice of the qualified expert, the County Attorney, *and* followed his advice to the letter (literally since the County Attorney typed up the warrant and affidavit). (Depo. of Harden, pp. 26, 71).

What did the County Attorney know. He knew that marijuana had been grown in the County. He knew that the condition of the field, the corn, and the marijuana strongly indicated that whoever grew the corn also grew the marijuana. He knew that a deputy sheriff had told Chief Harden that Beril Hoosier had grown the corn. He knew that Beril Hoosier was a farmer who did grow corn in partnership with other farmers. And he knew that Beril Hoosier had spoken with Chief Harden shortly after the marijuana had been found.

These facts *may* not have been adequate to constitute probable cause. The County Attorney may have been mistaken. Maybe the County Attorney should not have typed up the warrant and affidavit and instructed Chief Harden to take it to the State Judge. *Maybe* the County Attorney should have had Chief Harden do further research to confirm that the deputy sheriff was right about who grew the corn. The mistake, if there was one, was attributable to the County Attorney. Chief Harden played his role correctly; he gathered information and presented all of it to the person qualified to evaluate it.

Just as the advice of counsel eliminates malice in a suit for malicious prosecution, the advice of counsel should establish reasonableness of a police officer seeking guidance on the mixed factual-legal question of probable cause. The rule would not establish absolute immunity as the officer would still have to show full disclosure of the facts in his/her possession and good faith reliance on the prosecutor's advice. The rule would provide a badly needed degree of certainty for officers. And, appropriately, such a rule would also provide a significant benefit to individuals who are subjects of criminal investigations by promoting

better decisions on probable cause *before* warrants are issued rather than punishing police officers after mistakes are made.

Respectfully submitted,

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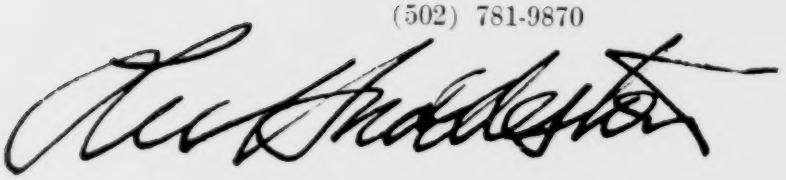

APPENDIX

Nos. 89-5706/5707

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
See Sixth Circuit Rule 24.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BERIL HOOSIER, - - - - *Plaintiff/Appellant,*

v.

BOBBY HARDEN, - - - - *Defendant/Appellee.*

On Appeal from the United States District Court
For the Western District of Kentucky

Filed March 13, 1990

Before: WELLFORD and GUY, Circuit Judges; and ENGEL, Senior Circuit Judge.

WELLFORD, Circuit Judge. Plaintiff Beril Hoosier, a rural farmer, sued defendant, Bobby H. Harden, as an "acting policeman of the Taylor County (Kentucky) Metro Police Department" under 42 U.S.C. § 1983, charging him with an intentional, illegal, malicious, and wrongful "detention, search and arrest" under color of state law. Specifically, Hoosier charged Harden with obtaining a warrant of arrest for him for manufacturing 27 plants of marijuana which were observed and found growing on government-owned land in Taylor County. Hoosier charged Harden

with failure to exercise care "to learn the correct identity of the owner, lessee, or possessor of the property upon which the marijuana was allegedly found." Plaintiff also sued the County Judge-Executive but does not appeal from the grant of summary judgment to that official. He does appeal from the summary judgment granted defendant Harden. We reverse.

Defendant responded to the complaint with a general denial (except for issuance of an arrest warrant for defendant by a state judge) and also asserted the "affirmative defense" of qualified immunity. Hoosier asserts that there is a genuine issue of material fact that precludes the grant of summary judgment. The factual dispute relates to the content of a conversation between the parties in the vicinity of the courthouse after aerial surveillance had located marijuana on federal land. Defendant testified that three patches of marijuana were observed.

Harden testified that the government leased out the land in question along Stoner Creek but that he was "not sure who is the lessee." (Indeed he was not sure whether the federal or the state government leased out the land.) He was of the view that the part of the field with corn had been sprayed but the part containing the marijuana had not, so that there were weeds around the area where the marijuana was growing amidst the corn. In sum, defendant Harden felt the marijuana was planted with an effort to conceal it.

In carrying out his investigation, as Harden testified in a discovery deposition, across from the courthouse Hoosier approached him and stated, "I hear you found some marijuana on me." Defendant stated that he responded, "I don't know if I did or not. Do you have any corn up there?" Harden said Hoosier replied that he did have corn in the area "from 76 to Acton." Harden said he made *no*

further investigation who owned or farmed the land[1] in the rural and remote area near Stoner Creek where the marijuana was found. Harden said he relied entirely on discovery of the marijuana and what Hoosier said about where he had corn planted to make his formal complaint. Based on this asserted information, Harden obtained from Judge George an arrest warrant which stated that Hoosier was charged with manufacturing marijuana "in his corn field on Stoner Creek" in violation of Kentucky law.

Harden testified that he knew Hoosier as a local resident and had previously served a warrant on him. Harden and another law enforcement officer actually served the arrest warrant currently at issue at Hoosier's home. Harden could not recall the comments then made to him by plaintiff, but he acknowledged that plaintiff had taken a polygraph test concerning this affair. Based on the testimony of the parties the grand jury declined to return an indictment, and subsequently, on a second presentment, the result was the same.

After obtaining the warrant, defendant learned that one Glyn Abston helped Hoosier plant corn in the Stoner Creek area, and several months after serving the warrant Abston allegedly was present when Hoosier harvested the corn. Harden summarized: "It was my impression that the corn that was in that cornfield was Mr. Beril Hoosier's." He conceded, however, that he had no document or statement from anyone, including the government, that Hoosier had

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[1]Harden did say that "maybe James Cochran, [a deputy sheriff] told me that they thought that [the corn] belonged to Beril Hoosier. But I can't say for sure. I don't remember." This would not constitute, in our view, any independent evidence about Hoosier's alleged participation in planting or growing the marijuana in question. There was no corroboration of any such remark by Deputy Cochran or anyone else. Harden conceded he did not act on this purported "maybe" statement.

any lease along Stoner Creek or in that area. He later found evidence that the Commonwealth of Kentucky had a lease with Dennis Campbell II[2] in the Robinson Creek area ("probably" in the same area as Stoner Creek).

Hoosier's version of the crucial conversation with Harden was quite different: that he observed, "Bobby, I heard you found some marijuana on government ground," and that Harden responded affirmatively. He denied saying anything about owning or growing corn on any land in question on which marijuana was found, but clarified later that he "had corn from Elk Horn to Acton . . . *not* on Stoner Creek." He later confirmed he had interests in the Robinson Creek area and was interested in learning about discovery of marijuana, because a friend and neighbor had told him a deputy had been injured in jumping from a helicopter in locating marijuana on government land.

Hoosier also testified in his deposition that when arrested he asked Harden why he was being arrested and that the response was for growing marijuana on Stoner Creek. Hoosier testified further that he protested—"Bobby that's not mine, . . . I haven't been in my corn since I planted it." He averred that Harden responded that Hoosier needed to check his corn. He stated that Harden refused to take him to the place where the marijuana was found. Hoosier also testified that in 1985 he had two operations and had just been in the hospital before his brief (and disputed) initial conversation with Harden. He admitted in his deposition that he had been farming about 500 acres that year, but had no interest in the land or crop on which the marijuana was found. No other person was arrested in connection with the marijuana.

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[2]Dennis Campbell, Sr. was married to Mr. Hoosier's wife's daughter. Harden said he thought Hoosier and Campbell farmed together.

In reviewing the district court's grant of summary judgment, we must determine if there is any genuine issue of material fact such that a jury could return a verdict for the nonmoving party. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Yancey* v. *Carroll County, Ky.*, 876 F. 2d 1238, 1242 (6th Cir. 1989).

The district court, in granting summary judgment, found "no genuine issue of fact bearing on the question of whether a reasonable police officer would have believed that probable cause existed for the arrest of the plaintiff. . . ." The court noted the conflicting versions of the September 16 conversation between Hoosier and Harden, but found "other substantial evidence" that would support Harden's determination that probable cause existed.

Specifically, the court relied on the following information:

1. Land where marijuana was found was worked by Hoosier and Campbell in a joint venture;
2. A third party told Harden that Hoosier participated in farming that field; and
3. Evidence indicated that whoever grew the corn also grew the marijuana.

In the district court's factfinding process, we normally do not set aside factual predicates or findings unless clearly erroneous. On the other hand, if there exists a "genuine issue as to any material fact", a moving party is not entitled to summary judgment. Fed. R. Civ. Proc. 56(c). We are persuaded that in this case there remains a genuine issue of material fact with respect to the issue of probable cause, and to the claim of qualified immunity. Summary judgment for the defendant was therefore inappropriate. The underlying question here is whether there was probable cause for defendant to charge plaintiff at the time he ap-

plied for the arrest warrant, not in the light of subsequent discovery and hindsight on the part of either party.

We focus "on the objective legal reasonableness of an official's acts" when he claims the defense of qualified immunity. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 819 (1982). What would have been required of a reasonable police officer to determine reasonable cause to secure an arrest warrant for Hoosier? Harden is not protected here by the fact that a state judge issued a search warrant, because a vital component of the information furnished the issuing magistrate was an alleged—and seriously contested—oral communication between the charging officer and the accused. *See United States* v. *Baxter*, 889 F. 2d 731 (6th Cir. 1989).

The district court found that the land where the marijuana was found was worked by Hoosier and Campbell. The only basis for Harden's knowledge of this, at the time of seeking the warrant, was his "understanding" to that effect. But this "understanding" came from later information, not from what Hoosier initially purportedly admitted that he, Hoosier, "said it was his." (Dep. p. 38). We find this basis for probable cause, the joint venture with Campbell, who was never charged, to be unavailing under the circumstances. It was not a corroborating factor despite the finding by the district court.

Next the district court found that a third party, perhaps Deputy Cochran, told Harden of Hoosier's participation. Harden alluded to this in passing but conceded:

> Q: Did that conversation actually go into your decision to fill out that affidavit and request the warrant against Beril Hoosier?
> A: No, sir, the evidence that I gathered at the time I was there and Mr. Hoosier coming to me, that's when I went to the County Attorney and advised him what I had.

The "evidence gathered" was the finding of the 27 marijuana plants. This, then, was not a corroborating factor either. Cochran was apparently available but did not testify.

The third item of "substantial evidence" relied upon by the district court, that "whoever grew the corn also grew the marijuana" is not seriously contested. It was a proper inference upon which defendant might reasonably act as an objectively reasonable police officer. This factor, however, as herein pointed out, still does not connect up with Hoosier unless one accepts Harden's contested version of the brief conversation with Hoosier. A reasonable police officer, moreover, would have pursued at least some minimal investigation to have tied Harden [sic. Hoosier] to the planting of the corn on the land in question. The fact that the grand jury refused to find probable cause to believe Hoosier guilty of the offense, even *after further investigation* was pursued, is some indication (1) that the content of the conversation was a material issue, and (2) that whether there was probable cause to believe that Hoosier was involved in the corn and land in question was doubtful.

Our standard of review on the grant of summary judgment is *de novo*, and our role is similar to that of the district court in reviewing the pertinent facts as a basis of a legal conclusion on the question of qualified immunity. *Pinney Dock & Transport Co.* v. *Penn Central Corp.*, 838 F. 2d 1445, 1472 (6th Cir.), *cert. denied*, 109 S. Ct. 196 (1988); *Hand* v. *Central Transport, Inc.*, 779 F. 2d 8, 10 (6th Cir. 1985) (per curiam). We have analyzed several of the factual bases for the district court's grant of summary judgment and find them insufficient and/or erroneous as a predicate for the legal result reached. We also conclude that there was a genuine issue of material fact involved that precludes summary judgment. Although the Supreme Court was dealing in a different context in con-

struing materiality in *Kungys* v. *United States*, 485 U.S. 759 (1988), we find the language analogous to the problem of a "material fact" in this case:

> [A]lthough the materiality of a statement rests upon a factual evidentiary showing, the ultimate finding of materiality turns on an interpretation of substantive law. Since it is the court's responsibility to interpret the substantive law, we believe [it is proper to treat] the issue of materiality as a legal question.

Id. at 772, *quoting United States* v. *Abadi*, 706 F. 2d 178, 180 (6th Cir.), *cert. denied*, 464 U.S. 821 (1983).

For the reasons indicated, we REVERSE and REMAND for further proceedings in this case consistent with the views expressed herein.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

Civil Action No. C-85-0221-BG(M)

BERIL HOOSIER - - - - - - - - - *Plaintiff*

v.

BOBBY H. HARDEN and
SAMUEL PHILLIPS - - - - - - - - *Defendants*

MEMORANDUM OPINION

Entered May 23, 1989

This matter is presently before the Court on the defendants' Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The plaintiff responded in opposition, and the defendants replied by memorandum.

As a result of having filed a Motion for Summary Judgment, the defendants have certain burdens to hurdle to justify the granting of the relief requested as a matter of law. As a party moving for Summary Judgment, the movant has the initial burden of proving the non-existence of any genuine issue of material fact and that it is entitled to Summary Judgment as a matter of law. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 157-60 (1970); *Felix* v. *Young*, 536 F. 2d 1126, 1134 (6th Cir. 1976). Once the movant has sustained its initial burden, then it is incumbent on the non-movant to "set forth specific facts showing there is a genuine issue for trial." *Anderson* v. *Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2514 (1986). Furthermore, the non-movant may not rely on the pleadings them-

selves to establish the existence of a genuine issue of fact after the movant has surpassed its initial burden. *Celotex Corp* v. *Catrett*, 106 S. Ct. 2548, 2554 (1986).

With respect to the complaint against Samuel Phillips, County Judge-Executive of Taylor County at the time of the incidents giving rise to the complaint, the plaintiff has conceded that the defendants' Motion for Summary Judgment as to him is proper. At the time the complaint was filed the plaintiff was under the mistaken belief that Phillips was responsible for personally overseeing any of the activities of the police, which would include those of defendant Bobby Harden, Chief of the Taylor County Metro Police. As further discovery has controverted this fact, the plaintiff joins in dismissing this case against defendant Phillips on his Motion for Summary Judgment, and further states that the claims against him will not be pursued further.

In accordance with defendants' motion, and in light of plaintiff's concession, this Court will grant defendants' Motion for Summary Judgment with respect to Samuel Phillips.

This Court will further grant the defendants' Motion for Summary Judgment with respect to defendant Bobby Harden.

The plaintiff has stated in its Response to defendant's Motion for Summary Judgment, that there clearly exists a factual dispute as to a conversation between Harden and Hoosier which could prove determinative of whether probable cause existed for Harden to pursue an arrest warrant for Hoosier. It is not the duty of this Court, however, to decide factual disputes. It is not on the alleged discrepancy of the above-mentioned conversation that this Court has decided to grant Summary Judgment. Rather, the basis of this Court's decision rests on the theory of qualified immunity. Whether a factual dispute exists on the issue of information which Harden obtained to base his opinion

on probable cause is irrelevant due to defendants' assertion of qualified immunity.

Defendants' recitation of the law with respect to qualified immunity is correct, and this Court is following the reasoning and analysis of the United States Supreme Court in reaching its decision in the instant case.

In *Harlow* v. *Fitzgerald*, 457 U.S. 800, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982), the Court held that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Discussing at some length the theory for qualified immunity, the court in *Harlow* stated:

> ". . . we explained that the recognition of a qualified immunity defense for high executives reflected an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, . . . but also 'the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.'" *Harlow*, 102 S. Ct. at 2732.

The court also stated the policy reasons for granting qualified immunity to public officials:

> "At the same time, however, it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will 'dampen the ardor of all but the most

> resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" *Harlow*, 102 S. Ct. at 2736.

The Supreme Court further clarified the qualified immunity doctrine with respect to public officials in *Anderson* v. *Creighton*, 107 S. Ct. 3034 (1987). In that case the Supreme Court of the United States determined that state and federal law enforcement officers are protected by qualified immunity from civil liability for actions satisfying a standard of objective legal reasonableness, assessed in light of legal rules clearly established at the time the action was taken. In so determining, the court recognized that qualified immunity from civil liability was intended to provide government officials with the ability "reasonably [to] anticipate when their conduct may give rise to liability for damages." *Anderson*, 107 S. Ct. at 3042, citing *Davis*, 468 U.S. at 195, 104 S. Ct. at 3019. Thus, officials may rest secure in their actions since they have this objective standard to guide them. They know they will not be held personally liable as long as their actions are reasonable in light of current law. *Anderson*, 107 S. Ct. at 3042.

In the above-captioned action, the plaintiff is claiming that a factual dispute is present which would preclude the granting of defendants' Motion for Summary Judgment. This Court respectfully declines to accept the plaintiff's argument. Rather, we are persuaded by the statement of the evidence that the defendants have presented, and in conjunction with the plaintiff's statements, we conclude that there exists no genuine issue of material fact to necessitate a trial. More specifically, there exists no genuine issue of fact bearing on the question of whether a reasonable police officer would have believed that probable cause existed for the arrest of the plaintiff effectuated by the defendant Bobby Harden.

It is undisputed by the parties that a conversation occurred on September 16, 1985, between Chief Harden and the plaintiff Hoosier. Chief Harden's rendition is that he was approached on the street outside of the Taylor County Courthouse by Hoosier. Chief Harden claims that Hoosier stated, "I hear you found some marijuana on me." Chief Harden replied, "I don't know if I did or not. Do you have any corn up there?" Hoosier answered, "Yeah." Chief Harden then asked, "Where at?," to which Mr. Hoosier answered that he had corn from Highway 76 to Acton. Chief Harden then asked him specifically, "All right. What about on Stoner Creek? You turn right at Acton, go across the bridge and around the curve, there's two cornfields. Whose are those." Mr. Hoosier admitted, "They're mine too."

Mr. Hoosier contends that Chief Harden's rendition of this conversation is incorrect. He denies saying to Chief Harden, "I hear you found some marijuana on me." Mr. Hoosier claims that the actual conversation was that he heard that some marijuana had been found "on government ground." However, there is other substantial undisputed evidence which Chief Harden used to make his determination that probable cause existed to secure an arrest warrant.

Mr. Hoosier worked together with Dennis Campbell II to grow corn on government land in southern Taylor County, working the fields together. They jointly applied for crop insurance for the corn grown on the government land. The profits from the joint venture were divided by allocating the corn from designated fields to each man. A joint aerial search was conducted by the Taylor County Metro Police and the Taylor County Sheriff's Department with the help of the Jefferson County Police, which search revealed a patch of marijuana in one of the fields being farmed by Mr. Hoosier and Mr. Campbell. Chief Harden was informed by a third party that Mr. Hoosier had par-

ticipated in growing the corn. Finally, it was also shown that whoever grew the corn also grew the marijuana. On these facts alone it is clear to this Court that Chief Harden was justified in procuring an arrest warrant. Clearly the County Attorney and Taylor District Court Judge Douglas M. George agreed with Chief Harden's opinion on the probable cause question or the warrant would not have been issued.

This Court is of the opinion that Chief Harden proceeded upon the evidence he had obtained in an objectively reasonable manner. There appears ample undisputed evidence to find that probable cause existed despite the discrepancy between Chief Harden and Mr. Hoosier as to their conversation on September 16, 1985. In light of the objectively reasonable manner in which Chief Harden proceeded in his discretionary capacity, the plaintiff's statutory and constitutional rights were in no way violated, and, this Court will grant Summary Judgment for the defendant Harden on the basis of qualified or good faith immunity.

An appropriate Order will be entered as of this same date.

Dated this 17th day of May, 1989.

(s) Ronald E. Meredith
Ronald E. Meredith
Judge, U.S. District Court

cc: Counsel of Record
Mr. Bryant
Mr. Miller
Mr. Huddleston
Mr. Noe

No. 89-5706/5707

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BERIL HOOSIER - - - - - - *Plaintiff-Appellant*

v.

BOBBY HARDEN - - - - - *Defendant-Appellee*

SAMUEL PHILLIPS - - - - - - - *Defendant*

ORDER — Filed April 18, 1990

BEFORE: WELLFORD and GUY, Circuit Judges, ENGEL, Senior Circuit Judge.

Upon consideration of the petition for rehearing filed by the appellee, the court concludes that the issues raised therein were fully considered upon the original oral argument and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is DENIED.

Entered By Order of the Court
(s) Leonard Green
Leonard Green, Clerk

90-141

No.

Supreme Court, U.S.
FILED
AUG 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

BOBBY H. HARDEN - - - - - **Petitioner**

versus

BERIL HOOSIER - - - - - **Respondent**

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is this case appropriate for review by the Supreme Court on the advice of counsel claim of qualified immunity, where there is a factual issue concerning the truth of certain conversations between Petitioner and Respondent which formed part of the basis for the arrest by Petitioner of the Respondent?

2. Is this case appropriate for Supreme Court Review on application of the claim that the arrest by Petitioner of Respondent was "objectively reasonable" as a matter of law, where there is a factual issue concerning the truth of Petitioner's Affidavit submitted in support of an arrest warrant for Respondent?

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No.

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October Term, 1989

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v.

BERIL HOOSIER - - - - - - - *Respondent*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the decision of the Sixth Circuit Court of Appeals. The foregoing decision reversed a Summary Judgment in favor of Defendant-Petitioner Harden, and remanded the matter for trial on the ground that genuine issues of material fact existed precluding the entry of Summary Judgment. This case is not appropriate for Supreme Court review for the reason that fact issues exist which, if resolved favorably to Respondent, would render moot the alleged basis for review advanced by Petitioner.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional clauses and statutes involved in this action are correctly set forth in Petitioner's Petition for Writ of Certiorari at pages 2-3.

STATEMENT OF THE CASE

A. Nature of the Case

This is a claim made by Respondent Beril Hoosier under the Civil Rights Act (42 U.S.C. Sec. 1983) for an arrest made without probable cause, subjecting Defendant-Petitioner Bobby H. Harden (Chief of the Taylor County, Kentucky, Metro Police) to liability. Plaintiff-Respondent contends that under any objective standard no reasonably competent police officer would have concluded that a warrant should issue based upon the facts known to Harden at the time (or which should have been known to Harden with any reasonable investigation) the warrant was issued for Hoosier's arrest.

B. Nature of the Proceedings

Following the filing of the Complaint, depositions were taken and interrogatories were addressed by all of the parties. Petitioner subsequently made motion for Summary Judgment on the theory that this action could not be maintained on the ground that the Petitioner was protected by the doctrine of qualified immunity. The District Court, after holding oral arguments, sustained the Motion. The Sixth Circuit Court of Appeals reversed and remanded the case to the District Court for further proceedings, holding that a genuine issue of material fact existed which precluded the entry of Summary Judgment. Petitioner's Petition for Rehearing was denied by Order entered April 18, 1990, and Petitioner now seeks this Court's discretionary review on Petition for Writ of Certiorari.

C. Statement of the Facts

Respondent is a farmer residing in Taylor County, Kentucky, near Campbellsville. In past years he had cul-

tivated government land leased from the Army Corps of Engineers in association with one Dennis Campbell. At some point during the fall of 1985, Petitioner Harden, Chief of the Taylor County Metro Police, became aware that some marijuana plants had been found growing along Stoner Creek on "government" land leased by some person from the Corps of Engineers. On September 18, 1985, Petitioner Harden obtained a warrant for the arrest of Respondent charging a violation of a state statute KRS 218A.140, specifically alleging that the Respondent was "manufacturing 27 plants of marijuana *in his cornfield* on Stoner Creek . . ." (emphasis added). The corn in question encompassed several hundred acres. No attempt whatever was made by Harden to determine ownership of the cornfield nor to determine who leased the land on which the marijuana plants were found.

Prior to the arrest there was a conversation between Respondent and Petitioner on a street in Campbellsville, Kentucky, concerning which a factual dispute exists. Because of the reliance of the District Court upon Petitioner's version of the conversation, it is important that the Supreme Court realize that each party to the conversation had diametrically opposed versions of its content. Harden testified in his deposition that Hoosier approached him and said, "I hear you found some marijuana on me." Harden also claims that Hoosier admitted that the land on which the marijuana was found was farmed by him. Hoosier denies this, and says that the actual conversation was that Hoosier asked Harden whether he had found some marijuana "on government ground." Hoosier denied admitting that the corn or the marijuana were his.

The case was thereafter submitted to the Taylor County grand jury, which refused to indict. The case was resub-

mitted subsequently to a second grand jury, and again the grand jury refused to indict.

On April 10, 1987, Respondent took the deposition of Petitioner, during which Harden testified to the facts that were in his possession *at the time* he obtained the warrant. Harden was specifically asked if he had any idea whose cornfield it was on which the marijuana was found, and Harden testified (p. 37):

> "I believe somebody had mentioned it could have belonged to Beril, but as far as me knowing for sure, I didn't."

Harden did not identify any particular person as the one who told him this information, and he could not point to any specific time or location during which this conversation supposedly may have taken place. It is clear that all Harden knew was that the corn "could have belonged" to Hoosier, but conversely it could have belonged to any other person just as easily. Harden then testified that judging from the physical viewing of the marijuana plants, "The person who had that corn had the marijuana." (p. 38). Harden then testified that the reason he thought the corn was Hoosier's at the time he took out the warrant was the conversation in Campbellsville that he had with Hoosier, about which the testimony of Harden and Hoosier is diametrically opposing and concerning which a genuine issue of fact exists as to who is telling the truth (p. 40).

We thus have from Harden's own testimony that he knew only two things about the corn at the time he swore out the warrant for Hoosier's arrest: (1) a vague conversation may have taken place with someone whose identity is unknown who said that the corn "could have belonged" to Hoosier, but Harden didn't know for sure, and (2) the

conversation with Hoosier during which Harden claims Hoosier admitted the corn was his. In addition, Harden claims that he believed that whoever planted the corn also planted the marijuana because the marijuana appeared to have been set rather than growing wild. Of course, this latter observation is logically flawed because anyone could have come onto the field after the corn was planted and planted marijuana under cover of darkness; just because someone plants corn does not mean that he also planted marijuana subsequently found in the field. At no time did Harden have any statements or testimony from any witness that Hoosier planted any marijuana.

The District Court in its Opinion (p. 6) recites evidence that Hoosier worked together with Dennis Campbell to grow corn on government land in Taylor County, and the persons jointly applied for crop insurance grown on government land. These facts were not known to Harden at the time the warrant was taken out and were improperly relied upon the District Court in its Opinion to support its issuing of Summary Judgment. A simple investigation by Harden into the leases on the government land along Stoner Creek would have revealed the land in question was not leased by Hoosier, but instead was leased by Dennis Campbell. Neither Dennis Campbell nor anyone else has been charged with growing the subject marijuana, to this day.

REASONS WHY REVIEW SHOULD BE DENIED

The "bottom line" issue in this case is simply whether the District Court improperly determined that no genuine issue of material fact existed and that Petitioner Harden was entitled to Judgment as a matter of law. The law and evidence are clear that Summary Judgment was not appro-

priate in this case, and the decision of the Sixth Circuit was correct in reversing and remanding for further proceedings.

Petitioner contends that this Court should adopt an "advice of counsel" defense on the facts of this case such that Petitioner should be clothed with immunity from civil liability. The facts before this Court in the present action are inappropriate for consideration of this issue because a factual issue exists concerning the truth of the alleged facts conveyed by Petitioner to the City Attorney (upon which information the City Attorney allegedly rendered his advice to seek a warrant for arrest).

There also is a genuine issue of fact concerning the content of the conversation between Hoosier and Harden in the City of Campbellsville, and if this fact question should be resolved by a jury in favor of the Respondent, it would necessarily lead to the conclusion that Harden misled the City Attorney, since Harden contends that Hoosier admitted that the marijuana was "found on me," which Hoosier denies. Another factual dispute exists concerning the truthfulness of the Affidavit submitted by Petitioner in his efforts to obtain a warrant for Respondent's arrest. The Affidavit recites that Respondent was growing marijuana "in his corn field on Stoner Creek," whereas the land on which the marijuana was found did not belong to Respondent at all, and no attempt whatever had been made by Petitioner to determine who owned or leased the land on which the marijuana plants were found.

The only evidence at all in this case connecting Hoosier with the marijuana found in the field was the fact that Hoosier (along with at least a half-dozen other people) had been in the field *once* when the corn was planted. The marijuana found by the police had not been planted along

with the rest of the field, and Harden admits this in his deposition (p. 20). There was no evidence at all linking Hoosier to the marijuana itself. Harden's claim of probable cause for taking out the warrant rests entirely upon the fact that some nebulous, unidentified person told him that Hoosier had been involved in planting the corn, and that the marijuana did not appear to have been growing wild; the foregoing together with the alleged conversation with Hoosier (concerning which the factual dispute exists) led Harden to take out the warrant.

Following the disputed conversation between the parties, Petitioner made no further investigation as to who owned or farmed the land along Stoner Creek. Instead, Harden related *his version* of the disputed conversation to the County Attorney, along with Harden's opinion that the marijuana had been planted rather than growing wild, and his opinion that whoever planted the corn planted the marijuana. Whether the foregoing "facts" presented to the County Attorney were truthful is a question for the trier of fact to resolve on remand.

Looking at the facts known to Harden at the time he swore to the Affidavit and took out the warrant, the best that can be said is that Harden knew that Hoosier may have assisted in some way in planting the *corn*. The same thing may be said of many other people in Taylor County, none of whom were arrested. Certainly a better case could have been made by Harden against Dennis Campbell, who held the lease on the property involved, and who was to benefit and retain *all the profits* from the sale of the corn at the harvest. None of the information developed after this suit was filed concerning sharing of the profits on various parcels of land, joint planting of corn, and fertilizing of the field was known to Harden at the time he took out the

warrant. All of this information developed subsequently and cannot be considered in reviewing the reasonableness of Harden's decision to swear to the false Affidavit and obtain a warrant.

Harden admitted that no charges were ever filed against any of the other individuals who were equally involved in the planting of the corn. Harden admitted that he knew of no witness who could testify that Hoosier planted any marijuana anywhere at all in Taylor County, much less on this particular field (Harden depo. p. 61).

Moreover, *Harden admits he made absolutely no investigation into determining ownership of the cornfield prior to swearing out his Affidavit in support of the warrant.* It would have taken Harden less than half an hour to walk over to the Corps of Engineers office in Campbellsville to find out who leased the property on which he says the marijuana field was found. The Affidavit of Harden is clearly false in that it alleges that Hoosier was cultivating marijuana in "his cornfield." There was no cause at all to believe that Hoosier had any connection whatever with the marijuana.

Petitioner relies upon *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982) as further explained in *Anderson* v. *Creighton,* 107 S.Ct. 3034 (1987), as requiring that the Complaint be dismissed on the basis that Harden was entitled to qualified immunity from a Civil Rights Act claim based upon his actions. These two decisions hold that acts or omissions of certain officials are protected as long as their actions are *objectively reasonable* in light of legal rules clearly established at the time the action of the police officer was taken. Conversely, however, where the police officer violates a clearly established constitutional principle, liability does lie and an action may be maintained; these clearly established

constitutional principles include arrest without probable cause. *Patzig* v. *O'Neill,* 577 F.2d 842 (3d Cir. 1978); *Patterson* v. *Commonwealth,* Ky. App., 630 S.W. 2d 73 (1981).

"Probable cause," as set forth in the Fourth Amendment to the Constitution, has been defined by the Supreme Court as those facts and circumstances known to a reasonably prudent police officer which would lead him to believe that a crime has been committed and the person to be arrested committed it. *Brinegar* v. *U.S.,* 338 U.S. 160 (1949); *Henry* v. *U.S.,* 361 U.S. 98 (1959). The question in this case is, therefore, whether Harden possessed as a matter of law from an objective standard sufficient evidence to constitute probable cause at the time of making his Affidavit to obtain the warrant for Hoosier's arrest. Harden did not have any such evidence in his possession.

It has been clearly established that the question of whether or not a police officer possesses probable cause to make an arrest is a jury question, rather than a question for the Court to determine as a matter of law. *Patzig* v. *O'Neill, supra,* at page 848.

The fact that an arrest or search is based on a warrant issued by magistrate, as here, does not automatically establish objective good faith on the part of the police officer who applied for the warant. Rather, the officer is liable where a "reasonably well-trained officer in defendant's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." *Malley* v. *Briggs,* 475 U.S. 335 (1986). The officer will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue. *Id.* Here the Affidavit was not even true.

Under the objective viewpoint set forth in *Harlow,* the defendant must at least conduct a rudimentary investigation into the facts, which investigation must support an objective conclusion that probable cause exists to believe that the person arrested committed the crime. It is clear in this case that no reasonable investigation was even attempted by Harden prior to making the arrest and seeking the warrant. At the very least, a fact question exists as to the content of the conversation in Campbellsville between Harden and Hoosier, upon which Harden says he relied. It cannot be said as a matter of law that the information Harden says he knew and relied upon at the time of taking out the warrant constituted probable cause for making the arrest. This fact is amply demonstrated by the refusal of two separate grand juries to indict Hoosier on these charges, even with all of the evidence that was subsequently purportedly developed by Harden after the fact.

CONCLUSION

Even from the objective standpoint set forth in *Harlow* and *Creighton,* it cannot be said as a matter of law that Petitioner had probable cause to believe the contents of the Affidavit he swore to in support of the arrest warrant for Appellant. The question of whether or not a police officer has probable cause to make an arrest is a question for the jury, given the reliance by Harden in this case upon a disputed conversation concerning which a genuine issue of fact exists. A jury is entitled to determine the facts based upon their own hearing of the evidence.

The jury in this case could find from the evidence that Petitioner's Affidavit was false, and could also find that the disputed conversation between Petitioner and Respondent

did not contain any admission by Respondent that marijuana had been found on him, but rather that Respondent had only stated that he had heard Harden found some marijuana "on government ground." The jury could also find from the evidence that Petitioner had no probable cause to make the arrest or obtain the warrant. Because genuine issues of fact exist for jury determination, it is inappropriate for this court to grant a Writ of Certiorari at this stage of the proceedings. If the jury renders fact findings adverse to Petitioner, the questions presented by Petitioner for review would be rendered moot. Any decision by the Supreme Court would therefore be in the nature of an advisory opinion rather than a decision based upon an actual case and controversy on the issues presented for review. Accordingly, the Petition for Writ of Certiorari should be denied.

Recognition of an "advise of counsel" defense to police officers in these 42 U.S.C. Sec. 1983 actions would have the practical effect of extending prosecutorial immunity to every police officer in the country and would emasculate the deterrent effect of Sec. 1983 civil actions. Such a policy decision by this Court would undoubtedly lead to every police department establishing a procedure by which it *always* obtained the advice of the prosecuting attorney's office prior to obtaining a warrant, thus effectively immunizing its police officers from any civil liability irrespectively of the nature of their conduct. The "advice of

counsel" defense is not deserving of consideration by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Service of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari has been made by mailing copies to Mr. Lee Huddleston, Huddleston Brothers, P. O. Box 2130, 1032 College Street, Bowling Green, Ky. 42102-2130, and to Mr. Larry D. Noe, 321 East Broadway, Campbellsville, Ky. 42718 this 15th day of August, 1990.

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